**MUHAMAD JAFRI JANTAN & ORS**

**v.**

**ZAINAL MD RAIS**

COURT OF APPEAL, PUTRAJAYA
ABDUL MALEK AHMAD PCA
ARIFIN ZAKARIA JCA
TENGKU BAHARUDIN SHAH JCA
[CIVIL APPEAL NO: C-04-44-2004]
20 JANUARY 2005

***TORT:*** *Negligence - Road accident - Action for damages - Apportionment of liability - Innocent passenger - Whether entitled to claim damages on 100% basis - Whether pillion rider of motorcycle entitled to claim 100% damages against defendant although rider of motorcycle contributed 50% to accident - Whether pillion rider can be held vicariously liable for rider's contributory negligence*

***DAMAGES:*** *Action for - Apportionment of liability - Innocent passenger - Whether entitled to claim damages on 100% basis - Whether pillion rider of motorcycle entitled to claim 100% damages against defendant although rider of motorcycle contributed 50% to accident - Whether pillion rider can be held vicariously liable for rider's contributory negligence*

This plaintiffs' action for damages before the Sessions Court arose from a road accident involving, on the one hand, a motorcycle owned by the 3rd plaintiff and ridden by the 1st plaintiff with the 2nd plaintiff riding pillion at the material time and, on the other hand, a motorcar driven by the defendant. At the end of the trial, both the plaintiffs' claim as well as the defendant's counterclaim were dismissed. (Nevertheless, the sessions judge assessed damages as follows: RM30,000 (general) and RM1,200 (special) for the 1st plaintiff; RM35,000 (general) and RM800 (special) for the 2nd plaintiff; and RM250 (special) for the 3rd plaintiff.) The plaintiffs then appealed to the High Court and the judicial commissioner allowed the appeal and apportioned liability on a 50:50 basis as between the plaintiffs and the defendant. Dissatisfied with the apportionment of blame for the accident, the 2nd plaintiff appealed to the Court of Appeal. The principal issue that fell for determination before the justices of appeal herein was whether the 2nd plaintiff, being a pillion rider, was entitled to damages on a 100% basis notwithstanding the fact that the rider of the motorcycle (1st plaintiff) had been found to have contributed 50% to the accident.

**Held (allowing the appeal)**
**Per Arifin Zakaria JCA delivering the judgment of the court:**

**[1]** The 2nd plaintiff was an 'innocent passenger' and was, therefore, entitled to damages on a 100% basis. He could not, as a pillion rider, be held to be vicariously liable for the contributory negligence of the 1st plaintiff. The judicial commissioner had thus erred in apportioning liability on a 50:50 basis as between the 2nd plaintiff and the defendant. (pp 698 c-g & 699 a)

*[Order accordingly.]*

*[**Bahasa Malaysia** Translation Of Headnotes*

Tuntutan plaintif untuk gantirugi di hadapan Mahkamah Sesyen di sini berbangkit dari satu kemalangan jalan raya yang melibatkan, di satu pihak, sebuah motosikal milik plaintif ketiga yang ditunggang oleh plaintif pertama dengan plaintif kedua sebagai pembonceng, dan, di pihak yang lain, sebuah kereta yang dipandu oleh defendan. Di akhir perbicaraan, kedua-dua tuntutan plaintif-plaintif serta tuntutan balas defendan telah ditolak. (Walaupun begitu, hakim sesyen telah menilai gantirugi seperti berikut: RM30,000 (am) dan RM1,200 (khas) bagi plaintif pertama; RM35,000 (am) dan RM800 (khas) bagi plaintif kedua; dan RM250 (khas) bagi plaintif ketiga). Plaintif-plaintif kemudian merayu ke Mahkamah Tinggi dan pesuruhjaya kehakiman membenarkan rayuan dan membahagikan tanggungan pada kadar 50:50 di antara plaintif-plaintif dan defendan. Tidak berpuas hati dengan pembahagian tanggungan bagi kemalangan tersebut, plaintif kedua merayu ke Mahkamah Rayuan. Isu utama yang berbangkit di hadapan hakim-hakim rayuan adalah sama ada plaintif kedua, sebagai seorang pembonceng, berhak kepada gantirugi pada kadar 100% walaupun penunggang motosikal (plaintif pertama) telah didapati menyumbang 50% kepada kemalangan.

**Diputuskan (membenarkan rayuan)**
**Oleh Arifin Zakaria HMR menyampaikan penghakiman mahkamah:**

**[1]** Plaintif kedua adalah seorang 'penumpang tidak berdosa' dan dengan itu berhak kepada gantirugi pada kadar 100%. Sebagai pembonceng, beliau tidak seharusnya didapati bertanggungan secara vicarious atas kecuaian yang disumbang plaintif pertama. Pesuruhjaya kehakiman dengan itu silap apabila membahagikan tanggungan pada kadar 50:50 di antara plaitnif kedua dan defendan.

*Perintah sekadarnya.]*

**Case(s) referred to:**

*Damai Cheras Sdn Bhd & Anor v. Poothapillai Krishnamoorthy [1999] 5 CLJ 576 HC* ***(foll)***

*Jayakumar Kuppusamy & Anor v. Chen Kit Hong & Anor [1984] 1 MLJ 376* ***(foll)***

*Murugasan Kuppusamy & Anor v. Chiew Eng Chai [2000] 1 CLJ 42 HC* ***(refd)***

*Oli Mohamed v. Keith Murphy & Anor [1969] 2 MLJ 244* ***(foll)***

*Reliance Omnibus Co Sdn Bhd & Anor v. Ishak Mohd Jaafar & Anor [1993] 4 CLJ 291 HC* ***(foll)***

*Samsuri Saad & Anor v. Chew Kit Toh And Another Appeal [1996] 2 CLJ 109 HC* ***(foll)***

*Wong Fook & Anor v. Abdul Shukur Abdul Hakim (Wong Piang Loy, Third Party) [1990] 2 CLJ 382; [1990] 1 CLJ (Rep) 536 HC* ***(foll)***

*For the 2nd appellant/2nd plaintiff - GP Lim; M/s S Harcharan Singh Randhawa & Partners*

*For the respondent/defendant - B Shanta Mohan; M/s VP Nathan & Partners*

*[Appeal from High Court, Temerloh; Civil Appeal No: 12-15-2000]*

*Reported by Gan Peng Chiang*

## JUDGMENT

**Arifin Zakaria JCA:**

This is an appeal by the appellant/second plaintiff (appellant) against the decision of the learned Judicial Commissioner (JC). We heard the appeal on 4 October 2004 and we allowed the appeal with costs. We now give our reasons.

The claim arose from a road traffic accident involving motorcycle CAH 387 ridden by the first plaintiff with a motorcar WAT 6824 driven by the respondent/defendant (respondent) on 29 August 1997 on Kg. Telok Sertang – Temerloh road. The appellant was the pillion rider on the said motorcycle. The third plaintiff is the owner of the motorcycle.

The learned Sessions Court Judge (SCJ) dismissed both the claim by the plaintiffs and the counter claim by the defendant. His assessment of general and special damages for the plaintiffs are as follows:

i) for the first plaintiff, the sum of RM30,000 as general damages and RM1,200 as agreed special damages; and

ii) for the appellant, the sum of RM35,000 as general damages and RM800 as agreed special damages.

The sum of RM250 was agreed as the special damages in respect of the third plaintiff.

All three plaintiffs appealed to the High Court against the decision of the learned SCJ. The learned JC allowed the appeal by the plaintiffs and apportioned liability on 50:50 basis between the parties. As regards quantum, the learned JC agreed with the assessment made by the learned SCJ.

The appellant now appeals to this court against the decision of the High Court as regards the apportionment of liability. The issue before us is whether the appellant as the pillion rider is entitled to damages on 100% basis despite the fact that the court had found that the rider of the motorcycle with which he was travelling was 50% liable for the accident. The learned counsel for the appellant submitted that he is so entitled. In support, he cited a number of authorities which we shall refer to later in this judgment.

The learned counsel for the respondent submitted that the learned JC failed to address the issue of the counter claim by the defendant. And in the circumstances of this case, it is submitted that the learned JC ought to have allowed the counter claim against the first plaintiff. Had that been done, he contended the amount of the award to the second plaintiff would have been reduced accordingly. He relied on the case of *Murugasan Kuppusamy & Anor v. Chiew Eng Chai* [2000] 1 CLJ 42.

For convenience, we shall first deal with the issue of the counter claim by the defendant. On this, we agree with the learned counsel for the appellant that before the learned JC, the counter claim was a non-issue because there was no cross appeal by the respondent and for that reason, the learned JC was right in not considering the counter claim of the respondent. That we think disposes of the issue – for how could the learned JC consider the counter claim which was dismissed by the SCJ when there was no appeal by the respondent against the said dismissal?

Reverting to the primary issue in this appeal, which is whether the appellant, as the pillion rider, is entitled to damages on 100% basis even though the court found that the rider of the motorcycle was 50% liable for the accident, we only need to refer to some of the authorities cited to us by the parties. Firstly, we would refer to the case of *Damai Cheras Sdn. Bhd. & Anor v. Poothapillai Krishnamoorthy* [1999] 5 CLJ 576. In that case, the respondent (the plaintiff) was the registered owner of and a passenger in a car which was involved in a collision with the first defendant's car, driven by the second defendant. The plaintiff was travelling with his son (SP2) who was authorized

by the plaintiff to drive the car. The plaintiff brought an action against the defendants. The SCJ held that the defendants were 10% liable for the accident and since the plaintiff was an innocent passenger at all material times, the plaintiff was entitled to damages on a 100% basis. The defendants appealed. It was submitted that the plaintiff was not an innocent passenger because of the fact that the plaintiff was the owner of the car and SP2 was driving the car with the authority of the plaintiff. Therefore, the plaintiff was vicariously liable for the negligence of SP2 who was 90% liable for the accident. The issue before the court was whether the plaintiff was an innocent passenger and so was entitled to damages on a 100% basis.

In that case it was held, *inter alia*, that once a person has proved that he is an innocent passenger, he is entitled to a claim based on 100% liability. It is the personal prerogative of the innocent passenger to sue the negligent party responsible for causing damage or injury to him in the accident. In coming to that finding, the learned judge relied on a long line of authorities namely – *Oli Mohamed v. Keith Murphy & Anor* [1969] 2 MLJ 244; *Wong Fook & Anor v. Abdul Shukur bin Abdul Hakim (Wong Piang Loy, Third Party* [1990] 2 CLJ 382; [1990] 1 CLJ (Rep) 536, *Samsuri bin Saad & Anor v. Chew Kit Toh and Another Appeal* [1996] 2 CLJ 109 and *Jayakumar s/o Kuppusamy & Anor v. Chen Kit Hong & Anor* [1984] 1 MLJ 376. All the authorities cited by the learned judge point to one conclusion, that an innocent passenger in a motor vehicle or a pillion rider is entitled to recover the total amount of damages against a tortfeasor and it is within his prerogative to recover the damages against any one of the tortfeasors. In *Samsuri bin Saad & Anor v. Chew Kit Toh and Another Appeal (supra),* the same issue as in the present case was raised, that is, whether a pillion rider was entitled to recover 100% damages against the respondent where the learned SCJ found that both the deceased rider of the motorcycle and the driver of the motor lorry were equally to blame. The learned High Court judge in that case, following *Oli Mohamed v. Keith Murphy & Anor (supra)* and *Reliance Omnibus Co. Sdn. Bhd. & Anor v. Ishak bin Mohd. Jaafar & Anor* [1993] 4 CLJ 291, held that the pillion rider is entitled to the total amount of damages notwithstanding the finding that the deceased rider of the motorcycle and the driver of the motor lorry were equally blameworthy. We wholly agree with the decision of the learned judge in that case.

For the above reasons, we hold that the learned JC erred in law in holding that the appellant, the pillion rider on the motorcycle, is 50% liable for the accident. Following the authorities cited, we hold that the appellant is entitled to recover the total amount of damages against the respondent.

Accordingly, we allowed this appeal by the appellant with costs. The deposit is to be refunded to the appellant.